Supreme Court, Hawaiian Islands.

In Equity.

THE HAWAIIAN GOVERNMENT VS. A. J. CARTWRIGHT, Executor and Trustee of the Estate of Queen Emma Kaleleonalani, deceased. and Chas. R. Bishop, Sam'l M. Damon, Chas. M. Hyde, Chas. M. Cooke and J. O. Carter, Trustees under the will of Hon. B. Panahi Bishop, and Chas. R.

BEFORE JUDD, C. J.

OPINION OF JUDD, C. J.

This bill was filed February 22. 1884, by J. M. Kapena, then Minister of Finance, against Queen Dowager Emma and Hon. Mrs. B. Pauahi

A demurrer which raised the vital questions involved was overruled by me July 23, 1885. At that date both the respondents had deceased, and upon suggestions thereof the parties above named in the caption of this case have been substituted for the original respondents. The plaintiff has been changed since passage of the Act of September 6, 1888, to provide for the bringing of suits by or against the Hawatian Governmentto the Hawaiian Government.

Following is the bill: The petition of John M. Kapena presented to this honorable Court respectfully shows:

1. That the defendant, Her Majesty Emma Kaleleonalani, Queen Dowager, is one of the heirs at-law of His Majesty, the late King Kameha-meha IV.

2 That the defendant, Bernice Pauahi Bishop, is the heir at-law and devisee of H. H. Ruth Keelikolani, deceased, who in her lifetime was the heir of His Majesty, the late Kamehameha V., and as such the heir of the one undivided half of the estate of his said Majesty, the late King Kamehameha IV.; that her said Majesty Emma Kaleleonalani, Queen Dowager, and the said Bernice Panshi Bishop are the only heirs of said estate of His Majesty the late King Kamehameha IV.

3. That Charles R. Bishop is the husband of said Bernice Pauahi Bishop, all of Honolulu, Island of Oahu. in the Kingdom of the Hawaiian Islands.

4. That your petitioner is the Minister of Finance of said Kingdom, and that as such Minister of Finance for and on behalf of the King and the people of said Kingdom of the Hawaiian Islands, he asserts the demand and asks for the relief hereinafter set forth.

5. That under and by virtue of an Act of the Legislature of the said Kingdom, entitled "An Act to Relieve the Hoyal Domain from encumbrances and to render the same inalienable," approved the third day of January, A. D. 1865, the then Minister of Finance was authorized to issue certain bonds not exceeding in amount the sum of thirty thousand dollars for the purpose of paying sundry encumbrances upon the Royal Domain then existing after the private estate of his said Majesty the late King Kamehameha IV. had been sold and the proceeds of such sale had been applied to the payment of said incumbrances so far as the said proceeds might avail.

6. That all the estate of his said Majesty the late King Kamehameha IV. was sold for the purpose of ap-plying the proceeds of such sale to the payment of said mortgages, except those certain parcels and pieces of land described as follows to wit:

First. All that tract or parcel of land situated in the city of Honolain. Island of Oahu, bounded and described as follows: Commencing at the "Merchant's Exchange," so called, and extending along Merchant street 101 10-12 feet toward the office of the Polynesian office 971 feet, thence along the lot formerly occupied by the "Varieties Theatre " 85 9-12 feet to a small fig along the same lot to the lot of Utai and Abee, thence to lot of the said "Merchant's Exchange" and along said lot to place of commencement; being the estate ordinarily designated as the "Honolula House," together with the buildings, structures, privileges and appartenances thereon situated and thereto belonging.

(Then follows descriptions of some six other pieces of land.)

Which said above described pieces and parcels of land were not sold as prescribed in the said Act of the Legislature for the reason that said described premises were held and believed to be part of the Royal Domain and not part of the estate of his said Majesty the late King Kamehameha IV.

7. That said premises in truth and in fact were not part of the Royal Domain, but were lands belonging to the estate of His Majesty the late King Kamehameha IV.

8. That his said Majesty the late King Kamehameha IV. in trust for himself granted by his certain deed the said premises (hereinbefore first described) to one Wm. Webster, with a view of mortgaging the same, a copy of which deed is hereto attached marked Exhibit A and made part

9. That thereafter the said Wm. Webster as such grantee but for the use of his said grantor made his certain indenture of mortgage conveying to one J. Mott Smith the said first above described premises, a of which indenture of mortgage is hereto attached marked Exhibit B and made part hereof. That by said mort gage the said mortgagor undertook right, title and interest in and to the to secure to the said mortgagee the premises hereinbefore described to payment of the sqm of six thousand the plaintiffs therein, the defendants dollars with interest thereon at the in this action, and that the said de-

10. That the then Minister of Fihereinbefore mentioned all the pri vate property of the estate of his said Majesty the late King Kamehameha IV had been sold in accordance with the provisions of the said Act of the Legislature issued the bonds of the Hawanan Government decree. amounting to the sum of twentyseven thousand dollars and paid said various persons then having liens petition described. and mortgages upon the said Royal Domain and extinguished and released said liens and mortgages.

ister of Finance the lien and mortgage made by said Wm. Webster to from a sale of the said premises. the said J. Mott Smith amounting to the sum of seven thousand three hundred and thirty-two (\$7,332) dol- said premises. lars upon the premises hereinbefore first described was by said Minister

of Finance paid and discharged. 12. That in consideration of the payment by the said Minister of Finance of said liens and mortgages and in the belief that the said premises were part of the Royal Domain and not part of the estate of his said Majesty the late King Kamehameha IV one Robert Moffitt, executor of the last will and testament of the said Wm. Webster then deceased made his certain deed of conveyance to John O. Dominis, Ferdinand W. Hutchinson and Charles C. Harris, the then duly qualified and acting Crown Land Commissioners and that the said Crown Land Commissioners and their successors in office have ever since then held and now hold said premises as part of the Crown lands. That said last mentioned deed is hereto annexed mark-

ed Exhibit U and made part hereof. 13. That all the said above described premises were at all times until the date of the various judgments hereinafter mentioned by the parties to this action and the people generally believed to be and were reputed to be a part of the Royal Domain or Crown lands so called and, not lands belonging to the estate of His said Majesty the late King Kamehameha IV.

14. That under and by virtue of John M. Kapena. the aforesaid Act of the Legislature the possession of the Royal Domain all times hereafter saving and reor Crown lands so called was vested in the said Crown Land Commissioners and has been held by them and their successors in office ever since the passage of said Act including the pieces and parcels of land hereinbefore in paragraph 6 of this bill particularly described.

15. That by the provisions of said Act of the Legislature one fourth of the annual revenues derived from the said Royal Domain or Crown lands so-called should be set apart and applied to the payment of the Pauli Bishop were the only heirs Sec. 335 and authorities there interest upon the bonds issued noder of the estate of His Majesty the cited. said Act and any excess thereof late King Kamehameha IV., as in should be applied to the payment of said bill of complaint alleged. the principal of said bonds.

terest due thereon has ever been

17. That after the issuing of said bonds and the payment of the said sum of twenty-seven thousand dollars by the then Minister of Finance to wit: on the 12th day of March A. D. 1881, Her Majesty Emma Kaleleonalani Queen Dowager defendant herein did commence her certain action in this honorable Court and filed her complaint therein against the Crown Land Commissioners praying among other things in said complaint that she recover one unpremises hereinbefore described as heir at law of His said Majesty the late King Kamehameha IV. That such proceedings were thereafter had in said action, that a judgment was rendered against the Crown Land Commissioners and in favor of Her said Majesty Queen Emma Kaleleonalani for the possession of said

18. That after the issuing of said the then Minister of Finance to wit: on the 1st day of March A. D. 1883, Her late Highness Ruth Keelikolani did commence her certain action in this honorable Court and filed her complaint therein against the Crown Land Commissioners praying among other things that she recover possession and have restitution and be adjudged to have the title in fee of and to the one undivided moiety of as heir of the estate of His said Ma- said Crown Lands; jesty the late King Kamehameha IV. by way of descent, and that such proceedings were thereafter had in said action, that the defendant, C. R. Bishop, and one R. W. Meyer, were thereafter and upon the decease of the said plaintiff Ruth Keelikolani substituted as plaintiffs in her place, and that thereafter this Honorable Court rendered its judgment therein against the Crown Land Commissioners and in favor of the plaintiffs for the restitution and possession of the undivided moiety of said prem-

19. That after the issuing of said bonds and the payment of the said sum of twenty seven thousand dollars by the then Minister of Finance, to-wit, on the 6th day of March, A. D. 1883, the defendants herein commenced their certain action in this honorable Court, and filed their complaint therein against the Crown Land Commissioners, praying among other things that this honorable Court make its decree, decreeing that said defendants therein, the Crown Land Commissioners, convey all their

session of said premises; and that to the said Act of the Legislature had in the said action; that a decision was made granting the relief prayed for in said action by the plaintiffs therein, the defendants in this action.

Wherefore your petitioner prays that this honorable Court make its

1. Decreeing that the said sum of twenty-seven thousand dollars is sum realized from said bonds to chargeable upon the premises in this

2. That your petitioner for and in behalf of the King and the people of the Hawaiian Islands is entitled to 11. That among other liens and have and recover the said sum of mortgages so paid by the then Minmuch thereof as may be realized

3. That in equity a lien exists in favor of your petitioner upon the

4. That said premises be sold in such manner as this honorable Court may direct, and that out of the proceeds of such sale there shall be paid to your petitioner as Minister of Finance of this Kingdom, after deducting costs and expenses of said sale, the sum of twenty-seven thousand dollars, and that the surplus, if any, arising from such sale be paid to the defendants herein.

5. That your petitioner have such other and further relief as may be meet in the premises and consistent

with equity. 6. That it may please this honorable Court to order process to issue summoning the said defendants to appear and answer this petition at such time and place as the law of the Kingdom and the practice of the Court directs.

The following answer was filed: "The joint and several answers, leave of Court herein had and obtained of A. J. Cartwright, trustee of the estate of the late Emma Kaleleonalani, and Charles R. Bishop, S. M. Damon, C. M. 234; Cooke, C. M. Hyde, and J. O. Carter, trustees of the estate of the late Bernice Pauahi Bishop, substituted defendants to the bill of complaint of the Hawaiian Government, substituted plaintiff in the place of

"These defendants now and at serving to themselves all manner of benefits and advantage of exception to the many errors and insufficiencies in the bill of complaint contained, for answer thereunto say, or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say:

1st. That they admit that the late Queen Dowager Emma Kale leonalani and the late Bernice Bispham's Principles of Equity,

16. That no part of the principal ment by the Legislature of the act Crown lands. Paumalu and Pupu- relieve the Royal Domain from endue upon said bonds or of the in- set forth in the fifth subdivision of kea, as well as Honolulu Hale. cumbrances, and to render the said bill of complaint, but say that The mortgage was not then due. Crown lands;

paying debts of his late Majesty they acted by mistake. The case mit that portion of said subdivision | that presented on demurrer. divided moiety of in and to the six which alleges that said prem- "The most that can be said is of His said Majesty Kamehameha sureties upon this note? The pay-IV , and deny the same to be true.

4th, They admit the seventh, said bill of complaint. They deny the then Minister of Finance be-Royal Domain, and extinguished to carry out the Act. to the Commissioners of Crown Crown Commissioners. There was

5th. They deny the eleventh subdi- money was advanced for the purallege and say that the mortgage therein mentioned was paid by the Commissioners of Crown Lands. and that there was contained in said mortgage two certain other ment of the loan, and security was pieces of property, to-wit: the Ahupusa of Pupukea and Paumalu, charge upon the income of the be first exhausted in paying his situate in the District of Koolauloa. Island of Oahu, and which were at gation upon payment of a debt and from said mortgage, and was not paid by mistake;

6th. They admit the execution of the deed set forth in subdivision (12) of said bill of complaint, but deny that the same was made under the belief or for the consideration named in said paragraph;

7th. To the (16) subdivision of 35; said bill of complaint they say that they do not know whether said for rent. bonds or the interest thereon have been paid or not;

nance believing that in conformity such proceedings were thereafter said bill of complaint alleged, and of accord and satisfaction. All that stry and the Probate Judge. said actions as therein set forth;

of the Legislature approved the complainant in the premises,

Wherefore they pray to be dismissed bence with their costs.' Messrs. F. M. Hatch and C.

Brown for respondents say: "I. Upon the facts shown at the hearing it is respectfully submitted that the Hawaiian Government is not entitled to be subrogated to the rights of the mortgagee under

"The Legislature was not acting under compulsion to protect any existing title in the Government, therefore the doctrine of subrogation does not apply.

Sec. 11.

ereditor of the estate of Kamehait within the limits of the rule established by courts of equity. "Webster's Appeal. 86 Penn. St.

"Unger vs. Leiter, 32 Ohio et,

"Sanford vs. McClean, 3 Paige, N. Y. 117; "Shinn vs. Bodd, 14 N. Y. Eq.

"Woods vs. Nilson, 17 Ill. 218. "Kitchell vs. Mudgett, 37 Mich.

"Moody vs. Moody, 68 Me. 155; "Mosiers Ap. 56 Penn. St. 76.

"The mortgage was not paid at he instance of the debtor, or of his administrator, nor from the circumstances of this case can it be inferred that it was the intention of the parties that the Government should be entitled to the security. The contrary is the case as expressed by the Joint Resolution of 1865.

"Candle vs. Murphy, 89 Ill. 352. "The Hawaiian Government was not secondarily liable for the debt secured by the mortgage, nor in any way hable, it cannot therefore claim the right of subrogation.

"See also Sec. 336.

II. There was no mistake. The 2nd. That they admit the enact- mortgage in question was upon two the bonds therein mentioned were | The mortgagee could not be com-3d. That they admit so much of The Commissioners were bound by the sixth subdivision of said bill of law to take up this mortgage. Actcomplaint as sets forth the real ing directly in accordance with the correctly the position. estate not sold for the purpose of law there is no possibility of saying Kamehameha IV., but do not ad- is therefore entirely different from

ment to the sum of \$27,000, and have been cited of the payment of necessitate a larger vote of the paid the sum realized from said money to another under mistake public funds for the privy purse. bonds to various persons then hav- are not at all in point, because the ing hens and mortgages upon the money had to be applied as it was by the resolution of July 1866 as-

> of the Treasury, because an express | for the nation's gift of the money. contract was made for the repaytaken. The payment was made a Crown lands. Conventional subro- debts. " Overton on Liens, Sec. 209;

" Lien lost by taking security. " Berger vs. Potter, 32 Ill., 66; "Gilman vs. Brown, 1 Mason, " Williams vs. Roberts, 5 Ohio,

" Taking notes a waiver of a lien

" Hop Sing vs. Kum On, 6 Haw. 8th. And these defendants fur- the Legislature by the Act of 1866 meha III by the Land Commission. ther answering say that they admit released the Commissioners of These were believed to be Crown

the said Ruth Keelikolani as in The Act was an acknowledgment by the administrator, the then Minthat judgments were rendered in the Court can now consider is the legal operation of that Act The 9th. And these defendants fur- motives of the legislature nor the der a mistake, that there was no ther answering say, that the said persons intended to be benefited remaining private estate of Kamesum of \$27,000 is not chargeable cannot control the plain language hameha IV, and that all the lands upon the premises in said bill of of the law. It can hardly be complaint set forth as in said bill claimed that the Court could set of complaint alleged in that, the aside this Act on the ground it was same was assumed by the Ha- passed under a mistake, yet in no waiian Government by resolution other manner can its effect be avoided. There is no ambiguity 6th day of July, 1866; and that no about the Act. It is a simple relien in equity exists in favor of lease and results to the benefit of kea" and "Paumala," those liable secondarily as well as lands. the principal debtor.

" Counsel for the plaintiff insists that a lien results from the pay ment by the Government of certain money to the use of defendants' ancestor. This may be a foundation for a suit for money had and lien. The only hen which possibly the mortgage given by Wm. Web-ster to J. Mott Smith, dated March of the mortgage under subrogation. could be set up, would be the lien Approached from this standpoint, mortgage must be charged pro curred, would have been sold to If the Government can maintain -See Sheldon on Subrogation, this suit in its own name, it must "Neither was the Government a have been received by the tenant mortgage upon it was released. put into possession by them. But But the long delay in making the meha IV, nor a surety, nor did it it is again urged that the Governhave such an estate or interest in ment dealt solely with the Crown Government should recover inthe subject matter as would bring Commissioners. The latter took terest. up this mortgage and went into the lender any standing in Court. time the mortgage was released, This consideration seems to have additional force because the ac- be \$8,000, other particulars of the count between the lender and borrower is certainly settled."

> Having, in my decision on the demurrer (6 Haw. Rep. 579), gone thoroughly into the question of law involved in this case, a brief decision on the merits is all that is now necessary.

> I find that the plaintiff has proved all the essential facts alleged in its petition.

While fully adhering to the view taken by me on the demurrer that the doctrine of subrogation "is not to be applied in favor of one who has officiously and as a mere volunteer paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay," I am of opinion that the people of this Kingdom as represented by its Legislature had an interest in the Royal Domain sufficient to take Charter was duly organized, and elected the following named officers, viz: them out of the attitude of "officious volunteers.

The preamble of the Act of January 3d, 1865, entitled, "An Act to same inalienable," recites that "the history of said lands shows that authorized to be issued to the Com- pelled to realease any part of his they were vested in the King for missioners of Crown Lands, and security. There was no other the purpose of maintaining the the payment of the same was made | method in which these two Crown | Royal state and dignity, and it is a charge upon the revenues of the lands could be released from the therefore disadvantageous to the mortgage then by paying the debt. | public interest that the said lands should be alienated or the said Royal Domain diminished" states

The people have an interest in maintaining the Sovereign in a state suitable to his condition, consistent with the traditions and means of this country, and it havises so described were held and be- that in carrying out the law a bene- ing been decided by the Supreme lieved to be part of the Royal fit has incidentally resulted to Court and affirmed by the Legisdomain, and not part of the estate others. Suppose there had been lature that the Royal Domain or "Crown Lands" descended to the ment by the Crown Commissioners successor to the Royal office, and would have been a benefit to them. | not to the personal heirs or devisees eighth and ninth subdivisions of Could they be held to contribute? of the Sovereign, it is apparent that "The private estate had been ex- the people had an interest in them hausted when this mortgage was to protect. For if the rents from lieving all the private property of taken up. There is no evidence the Crown Lands were devoted to bonds and the payment of said sum | the estate of His said Majesty Ka- | that there was any estate available | the payment of the debts of the of twenty seven thousand dollars by mehameha IV. had been sold, issued for the administrators to dispose of. former Sovereign, or if they were the bonds of the Hawaiian Govern- "The Connecticut cases which sold for the same purpose, it would

Therefore, when the Legislature sumed the payment of the remainand released the same; and say that | "The transaction was simply a | ing debts of the late king, it was bonds to said amount were issued loan by the Government to the protecting the Crown Lands from further diminution, and was not a Lands as a loan, upon the security | no intention to keep alive the mort- | mere volunteer. Moreover, the the premises hereinbefore described of a charge upon the revenues of gages which were paid by the loan. consent of the King (K. V.) to the The contrary is the fact. The provision of the law rendering the Crown Lands thenceforth inahenvision of said bill of complaint, and pose of extinguishing the mort able, and therefore a permanent gages. They cannot be kept alive estate from which to support the by operation of law for the benefit | Sovereign was a good consideration

But this gift was upon the condition that the private estate of the late King (Kamehameha IV.) should

Section 1 of the Act of January that time and are now part of the a remedy for the payment itself, 3d, 1865, provides that the ex-Royal Domain, or so-called Crown | cannot co exist. Sheldon, Sec. 249. | chequer bonds shall be issued "to lands, and that said payment was The latent equity was displaced by be used to extinguish those mortmade in order to release said lands express contract. Or, in other gages (on the Royal Domain) which words, the equitable lien, if any ex- may remain unsatisfied after the isted, was lost by taking security. administrator of His late Majesty's estate has exhausted all the estate belonging to His late Majesty in a private capacity, which the said administrator may be legally entitled to use for the payment of the debts of the estate.'

But a number of pieces of land including honolula Hale were the private property of the King, they not being in the reserved list, but " It is further urged that when having been awarded to Kamehapayment of the said of six thousand dollars with interest thereon at the dollars with interest thereon at the rate of ten per centum per annum. It is action, and that the said de that proceedings were taken by Crown Lands from liability to pay the said the loan, it extinguished the debt. Was a common one, participated in PILES.

The money (\$27,000) then, was paid from the public treasury unwhich were included in the mortgage to Dr. J. M. Smith paid off by the treasury were Crown lands.

It is not important, in my opinion, that this mortgage was upon "Honolulu Hale" a private land of the King, and also upon "Pupu-

"Honolulu Hale" should have been sold by the administrator before the Minister of Finance could legally advance a dollar of the pubhe money towards discharging the mortgage on the Crown lands. It was not the object of the Legislareceived, but it cannot constitute a ture to benefit the then heirs-atlaw of the late King, but only the reigning Sovereign. But the heirs have been benefited by the retention to them of Honolulu Hale, all of the parcels of land in the which, if the mistake had not ocrata with the payment. An ac. pay the King's debts. I think it is count of rents must also be taken. consonant with equity and good conscience that the Government should now recover the value of be chargeable with rents which the said property at the time the claim makes it inequitable that the

I will sign a decree declaring the possession. It is true they took it Government to be entitled to a lien up with money loaned to them for upon the Honolulu Hale premises the purpose, but that does not give to the extent of its value at the which I find from the evidence to decree to be in accordance with the prayer of the bill as amended.

Messrs, Neumann and Carter for the plaintiff; Messrs. Hatch and Brown for defendants. Honolulu, June 18, 1890.

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WM. G. IRWIN & COMPANY, LIMITED,

And that the Corporation under said

Secretary and Treasurer . . . W. M. Giffard Auditor......T. C, Porter

Notice is also given that, pursuant to the terms of said Charter, no Stockholder shall be individually liable for the debts of the Corporation, beyond the ancount which shall be due upon the share or shares owned or held by himself. W. M. GIFFARD,

1335 30 Sec'y Wm. G. Irwin & Co., L'd. NOTICE.

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Notice is also given that pursuant to the terms of said Charter, no Stockholder shall be individually liable for the debts of the Corporation, beyond the amount which shall be due upon the share or shares owned or held by himself.
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